IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WEKESA O. MADZIMOYO, Plaintiff, v. GMAC MORTGAGE, LLC, *et al.*, Defendants.	)	Civil Action No. 1:09-cv-2355-CAP-GGB

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants GMAC Mortgage, LLC, JPMorgan Chase Bank, and The Bank of New York Mellon Trust Company, N.A., ("Defendants") move the Court for judgment on the pleadings. Defendants adopt and incorporate by reference herein the Motion for Judgment on the Pleadings previously filed by co-defendants McCurdy & Candler, LLC and Anthony DeMarlo on April 15, 2010 [Doc. 16], and provide the supplemental facts and argument below.

STATEMENT OF THE CASE

On March 23, 1999, Plaintiff Wekesa Madzimoyo obtained a mortgage loan from FT Mortgage Companies d/b/a Equibanc Mortgage Corporation in the principal amount of $140,600, which was secured by Plaintiffs' residence at 852 Brafferton Place, Stone Mountain Georgia, 30083 (the "Subject Property").

[Complaint, ¶ 16.] On July 6, 1999, servicing rights for the loan were transferred to Homecomings Financial Network. The servicing rights were subsequently transferred to GMAC Mortgage, LLC ("GMAC"). The loan and deed were subsequently assigned to JPMorgan Chase Bank and on April 7, 2006, The Bank of New York Mellon Trust Company, National Association acquired JP Morgan's business.

Plaintiff filed the instant action on July 29, 2009 in an attempt to halt the impending non-judicial foreclosure of the Subject Property. Plaintiff claims that Defendants' failure to produce the original Note for his review prior to initiating foreclosure proceedings somehow renders the foreclosure "unlawful" and "wrongful." [Plaintiff's Complaint, Doc. 1, Ex. A]. Plaintiff mistakenly concludes that he is entitled to enjoin the foreclosure sale of the Subject Property.

ARGUMENT AND CITATION OF AUTHORITY

Plaintiff's Complaint fails to state a claim against any of these Defendants. At its heart, Plaintiff's Complaint is an attempt to enjoin the foreclosure sale. Plaintiff is not entitled to the relief he seeks for several reasons.

A. Plaintiff Is Not Entitled to Injunctive Relief.

As a matter of Georgia substantive law, a borrower cannot obtain equitable relief related to a foreclosure, unless the borrower proves that he or she tendered to

the creditor the amounts admittedly due.[1] See, e.g., Taylor v. Wachovia Mortg. Corp., 2009 U.S. Dist. LEXIS 118322, *14-15 (N.D. Ga. 2009) ("Because plaintiff has not shown that he made any attempt to cure his default by paying the remainder of his debt, he cannot bring an action to stop the foreclosure sale of his property."); Taylor, Bean, & Whitaker Mtg. Corp. v. Brown, 276 Ga. 848, 849-50 (2003); Crockett v. Oliver, 218 Ga. 620, 621 (1963); Hill v. Filsoof, 274 Ga. App. 474, 475-76 (2005); Nicholson v. One West Bank, 2010 U.S. Dist. LEXIS 45993, *17 (N.D. Ga. April 20, 2010) ("Under Georgia law, '[a] borrower who has executed a deed to secure debt is not entitled to enjoin a foreclosure sale unless he first pays or tenders to the lender the amount admittedly due.'"), *adopting report and recommendation*, 2010 U.S. Dist. LEXIS 78704 (N.D. Ga. June 7, 2010). In his pleadings, the Madzimoyo does not allege that he made any such tender therefore he lacks standing to bring this action and is barred from obtaining any equitable relief, including an injunction to stop the foreclosure.

B. No Cause of Action Exists for a Failure to Produce a Note.

The basis of Plaintiff's Complaint appears to be the Defendants' alleged failure to produce an original copy of the Note prior to foreclosure. However,

[1] This principle derives from the "unclean hands" doctrine. See O.C.G.A. § 23-1-10 ("He who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action."); Taylor, Bean, 276 Ga. at 850 ("This maxim has been described as a favorite maxim of equity, as well as one of its oldest, and it applies to all types of cases.").

Plaintiff has cited no authority suggesting that production of a note is a condition precedent to a lawful foreclosure or that the failure to produce a note gives rise to a cause of action. In fact, there is no such requirement under Georgia law. See e.g., O.C.G.A. §§ 9-13-140 *et seq.*, 9-13-160 *et seq.*; 44-14-160 *et seq.*[2]

C. Plaintiff's FDCPA Claim Fails.

Plaintiff's Complaint mentions the Fair Debt Collection Practices Act ("FDCPA"), but fails to specifically allege any violations of the statute. To the extent Plaintiff is attempting to state a claim for a violation of the FDCPA that claim also fails. Foreclosure of a security deed is not "debt collection activity" under 15 U.S.C. § 1692(a) but merely "enforcement of a security interest" under 15 U.S.C. § 1692f(6). Warren v. Countrywide Home Loans, Inc., 2009 WL 2477764 (11th Cir. Aug. 14, 2009). Accordingly, the Defendants' efforts to foreclose on the mortgage were not debt collection activity under the FDCPA.

Moreover, none of the Defendants are subject to the FDCPA in this instance. The FDCPA governs the actions of "debt collectors." Creditors who collect on their own accounts under their own names are not "debt collectors" for purposes of the Act. Thus, the Act defines a debt collector as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the

[2] As pointed out in McCurdy's Motion, federal courts have concluded that a lender need not be in possession of a note prior to conducting a non-judicial foreclosure sale. [McCurdy's Brief, p. 4.]

> collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, ***debts owed or due or asserted to be owed or due another***....

15 U.S.C. § 1692a(6) (emphasis added). "The plain language of the statute does not include actions of a creditor taken in an effort to collect its own debts directly from its debtors." Sterling Mirror of Maryland, Inc. v. Gordon, 619 A.2d 64, 66 (D.C. App. 1993); accord Aubert v. American General Finance, Inc., 137 F.3d 976, 978 (7th Cir. 1998) ("Creditors who collect in their own name and whose principal business is not debt collection, therefore, are not subject to the Act;" affirming summary judgment in favor of the creditor); Murray v. Citibank (South Dakota), N.A., 2004 U.S. Dist. LEXIS 20941 (N.D. Ill. Oct. 18 2004) ("The FDCPA imposes liability on 'debt collectors,' not creditors.... A creditor seeking to collect its own debt is not liable under the FDCPA."); Kloth v. Citibank (South Dakota), N.A., 33 F. Supp. 2d 115, 119 (D. Conn. 1998) ("Generally, the FDCPA does not apply to creditors."). The cases are legion in which the courts have dismissed or granted summary judgment to creditors on FDCPA claims in just these circumstances. See, e.g., Meads v. Citicorp Credit Services, Inc., 686 F. Supp. 330, 333 (S.D. Ga. 1988); NationsBank, N.A. v. Peavy, 227 Ga. App. 137, 140 (1997) (FDCPA does not apply to creditor attempting to collect its own debt); King v. Amoco Oil Co., 182 Ga. App. 838, 840 (1987) (granting creditor-defendant

summary judgment because creditor not a "debt collector" and not subject to FDCPA).

The Bank of New York Mellon Trust Company was assigned an interest in the loan, and accordingly exercised its power of sale in order to collect the debt that it was owed. GMAC, the servicer of the loan, is also not subject to the FDCPA as a debt collector. See e.g., Nool v. Homeq Servicing, 653 F Supp 2d 1047 (E.D. Cal. 2009) (mortgagors' claim under FDCPA was dismissed where defendant was loan servicer as the court held that a loan servicer was not debt collector for purposes of 15 USCS § 1692a(6)); Bridge v Ocwen Fed. Bank, 669 F. Supp. 2d 853 (N.D. Ohio 2009) (FDCPA applies only to debt collectors and not to creditors collecting their own debts or to loan servicers; per 15 USCS § 1692a(4) and (6), statute is directed solely to conduct of debt collectors, not creditors, and creditor means any person to whom debt is owed.).[3]

D. Plaintiff's TILA Claim Fails.

On page 3 of his Complaint, Plaintiff cites the Truth In Lending Act ("TILA"). However, he failed to specify any alleged TILA disclosure violation in his loan documents. Nevertheless, any such claim would be barred by the TILA one-year statute of limitations. See 15 U.S.C. § 1640(e) (claim for damages under

[3] JPMorgan Chase Bank N.A. no longer holds the note and was in no way involved with the servicing of the loan or the foreclosure here in issue.

TILA must be brought "within one year from the date of occurrence of the violation.") A TILA violation "occurs" when the loan transaction is consummated. See, e.g., In re Smith, 737 F.2d 1549, 1552 (11th Cir. 1984). The loan originated on March 23, 1999, ten (10) years prior to this lawsuit, filed in July 2009.[4]

CONCLUSION

For the foregoing reasons and those stated in McCurdy's Motion, Defendants respectfully request that the Court grant their Motion for Judgment on the Pleadings and enter judgment in favor of these Defendants.

This the 12th day of October, 2010.

/s/ Kelly L. Atkinson
A. William Loeffler
Georgia Bar No. 755699
Kelly L. Atkinson
Georgia Bar No. 431204

TROUTMAN SANDERS LLP
5200 Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
(404) 885-3000

Counsel for Defendants
GMAC Mortgage, LLC,
JP Mortgage Chase Bank, and
The Bank of New York Mellon Trust
Company, N.A.

[4] The Court should also note that none of the Defendants were involved in the origination of the loan. See 15 U.S.C. § 1641 (assignee of creditor is liable "only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement.")

FONT VERIFICATION

Counsel for Defendants GMAC Mortgage, LLC, JP Morgan Chase Bank, and The Bank of New York Mellon Trust Company certify that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1C, namely times New Roman (14 point).

/s/ Kelly L. Atkinson
Kelly L. Atkinson

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the following by electronic mail or by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this the 12th day of October 2010 to:

Wekeza O. Madzimoyo 852 Brafferton Place Stone Mountain, GA 30083	Frank R. Olson, Esq. John D. Andrle, Esq. McCurdy & Candler, LLC P. O. Box 57 Decatur, GA 30031

/s/ Kelly L. Atkinson
Counsel for Defendants
GMAC Mortgage LLC
JP Morgan Chase Bank
The Bank of New York Mellon Trust Company

Motions

1:09-cv-02355-CAP-GGB Madzimoyo v. The Bank of New York Mellon Trust Company, N.A. et al
4months, SUBMMG

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered by Atkinson, Kelly on 10/12/2010 at 4:33 PM EDT and filed on 10/12/2010

Case Name: Madzimoyo v. The Bank of New York Mellon Trust Company, N.A. et al
Case Number: 1:09-cv-02355-CAP-GGB
Filer: GMAC Mortgage, LLC
JP Morgan Chase Bank, NA
The Bank of New York Mellon Trust Company, N.A.
Document Number: 23

Docket Text:
MOTION for Judgment on the Pleadings with Brief In Support by GMAC Mortgage, LLC, JP Morgan Chase Bank, NA, The Bank of New York Mellon Trust Company, N.A.. (Attachments: # (1) Brief In Support)(Atkinson, Kelly)

1:09-cv-02355-CAP-GGB Notice has been electronically mailed to:

Alan William Loeffler bill.loeffler@troutmansanders.com

Frank Reid Olson folson@mccurdyandcandler.com

John Dale Andrle jandrle@mccurdycandler.com

Kelly Lane Atkinson kelly.atkinson@troutmansanders.com

1:09-cv-02355-CAP-GGB Notice has been delivered by other means to:

Wekesa O Madzimoyo
852 Brafferton Place
Stone Mountain, GA 30083

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:

[STAMP dcecfStamp_ID=1060868753 [Date=10/12/2010] [FileNumber=3963042-0] [60b38ba08cc56d3de5f0226abcecf196715d3311f44bafd1da5c7ee18dd62faaa2 98f519fe78ecebe4a0449000d69618e30ea66657679f550c629e065bc67d70]]
Document description: Brief In Support
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1060868753 [Date=10/12/2010] [FileNumber=3963042-1] [3bfbf68d6e7401090585b3178ef503009a083a485dfb0a13e5b97184f7cfd735e9 60581517d848a4985995a7a910b30415e2a6e917837e448b11dfc9725c3690]]